No. 164.

Supp. Br. of Safford for P. E.

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In the Supreme Court of the United States.

October Term, 1898.

JOSEPH KIRBY,
Plaintiff in Error,
vs.
THE UNITED STATES.
No. 164.

Supplemental Brief for Plaintiff in Error.

A. G. SAFFORD,
Attorney for Plaintiff in Error.

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SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

It was admitted on behalf of the defendant, upon oral argument, that the jurisdiction of this court to review the proceedings of the district court of South Dakota could not be questioned.

It was also admitted that if the plaintiff in error succeeded in establishing any one of the four constitutional questions involved, this court should set aside the verdict.

Those questions are:

1. Whether the indictment is fatally defective.

2. Whether the plaintiff in error was once placed in jeopardy by reason of the discharge of the jury at his first trial, when he was not present in court.

3. Whether the jury empanelled at his second trial

which resulted in his conviction, was a constitutional jury.

4. Whether the act of March 3, 1875, is a constitutional statute.

It is submitted, however, that there are very serious and important questions for the consideration of this court other than these exclusively constitutional questions, and of which, under the authority of Horner *vs.* U. S., 143 U. S., 570, the court has jurisdiction because they constitute parts of the whole case, having those other elements which confer jurisdiction.

I.

Taking up the purely constitutional questions :

FIRST. If it be necessary to allege and prove all of the ingredients of which a crime is composed (and this is not seriously questioned), the indictment did not inform the accused of the nature of the offence of which he was convicted ; if it be necessary to allege the fact that the stamps were stolen property *at the time of their being received* by the plaintiff in error, or that they were the property of the United States *at that time*, or to allege from whom said stamps were received by him, the indictment is bad, and if the court finds that the indictment fails in any one of these three particulars, the plaintiff in error must prevail.

In reply to the suggestion that the second section of the act of March 3, 1875, describes several distinct offences, (*a*) receiving, (*b*) concealing, (*c*) aiding in concealing, (*d*) having, (*e*) retaining in his possession with intent to convert, stolen United States property, then this indictment which charges the plaintiff in error with "receiving" and "having," is bad for duplicity, it does not inform him of the nature of the accusation against him ; if these are independent crimes, he cannot

be charged with both offences in the same count. I submit, however, the words "concealing" and "retaining" being left out of the indictment, that the charge is simply that of being a receiver.

It is either a simple charge of receiving, which involves the necessity of an allegation as to the person from whom the property was received, or it is a compound allegation, and for that reason, offensive for duplicity.

SECOND. The only answers to the claim of former jeopardy, are (*a*) that the same was not presented by a *plea*, and (*b*) that the offence under the second section of the act of March 3, 1875, is a misdemeanor only. By turning to the record, it will be seen (p. 17) that the plaintiff's objection was not only substantially but formally in the nature of a *plea*; it is taken *verbatim* from the established precedents; after reciting the claims and acts in all the explicit verbiage of the common law, it concludes with a verification, as follows, "contrary to the form and effect of the statute, in such cases made and provided, *all of which this defendant is ready to verify.*"

Baysinger *vs.* State, 77 Ala., 60;
State *vs.* Welch, 79 Maine, 99;
Johnson *vs.* State, 29 Ark., 31.

Besides, it appears from the record (p. 9) that the court passed upon the question in the form it was raised, *without objection on the part of the prosecuting attorney.* Had the prosecuting attorney objected, upon the ground that the plea was not sufficiently formal, or out of time, certainly in a case pregnant with so much of importance to the plaintiff in error, the court would have permitted an amendment of the pleading.

Rex *vs.* Chamberlain, 6 C. & P., 93.

There being no objection, all questions as to strict

formality were waived, even if they existed; the court read, however, into the plea, the record of the court proceedings for the term and treating those records as a part of the pleading, overruled the plea, as if it had been demurred to, and this was one of the substantial exceptions of the plaintiff in error to the conduct of the trial (p. 100), and argued in the original brief at page 16.

To the objection that the offence (or offences) created by the second section of the act of March 3, 1875, being only a misdemeanor, I contend that such a holding would lead to a most absurd conclusion.

The tendency of the decisions of this court is to do away with the meaningless fictions of the common law; this court looks, particularly in criminal cases, to the substance rather than to the shadow; the reasons underlying the distinction in ancient times between felonies and misdemeanors, have long since lost their vitality, and have been trampled into the mud of history by the irresistible armies of civilization; the rule has gone, the reason for it no longer existing. That crimes have two rational divisions, founded upon reason and common sense, cannot be gainsaid, *i. e.*, those that are infamous and those that are not infamous; the amendment of the circuit court of appeals act, makes a subdivision of the class of infamous crimes appropriate, into (*a*) those capital and (*b*) those not capital, because capital cases can be brought to this court without involving the consideration of any federal statute or the constitution; having these divisions, capital, infamous, and non-infamous, there exists no substantial reason for others. This court has held that a statute imposing so severe a penalty as does this second section of the act of March 3, 1875 (and the court will note that the punishment is precisely the same in the first and

second sections of the law), is an infamous crime, and there is no reason why there should be one rule for one infamous crime, and another rule for another; the rights of persons under one infamous crime should be held to be the same for all infamous crimes; there is a reason for different rules for trials for the commission of crimes non-infamous; the old-time distinction formerly existing between felonies and misdemeanors may well be preserved as existing between infamous and non-infamous crimes, but any extending of the domain of misdemeanors over into the territory of infamous crimes amounts to the perpetuation of a senseless fiction of the law, particularly is this so in the courts of the United States where there are no common law distinctions of felonies and misdemeanors, although Congress, in its wisdom, sometimes creates an offence and says that it "shall be deemed a felony" or "a misdemeanor," as the case may be. There is no unvarying rule about this and all ought to be measured by their punishments.

THIRD. In regard to the challenge to the array of jurors, for the reason that the city of Sioux Falls was excluded from the territory from which the panel was drawn, it was contended before the court by the learned attorney for the defendant, that the constitutional requirement was complied with if the jury were drawn from anywhere in the district, no matter whether the vicinage of the crime was included or not.

This question, as shown in the original brief, pp. 18 *et seq.*, has been many times before the State courts and discussed by Judge Cooley, and other writers upon constitutional subjects; it is useless to enlarge upon the unanswerable reasonings of those cases and writers; it seems to be well settled that while the accused has not an inalienable right to have the jury drawn from

the whole body of the predetermined district, the territory from which the jury is drawn must in part comprise that of the vicinage of the crime.

But I insist, even if the court should not be convinced by the reasoning of the eminent judges in the cases cited, or by that of the writers of the elementary books, that in view of the constitutional phraseology, a judge at *nisi prius*, in a criminal case, has not an unreviewable discretion in that regard; if jury districts, under the provision of section 802, R. S., are to be changed upon the mere discretion of a judge, the greatest abuses might creep in; such a course in the administration of justice ought not to be permitted except upon judicial inquiry and rendition of a reviewable judgment; if it be simply a matter of discretion, unreviewable and final, and a judge can direct a jury to be drawn from the territory of a district excluding one important locality, he would have an equal right to direct the entire jury to be drawn from a single unimportant locality, and the only remedy would be in the Senate of the United States by impeachment, not a satisfactory solution of the question to one who by that injustice may stand convicted of an infamous crime.

FOURTH. The learned attorney for the defendant, admitted, as I understood him, that he was not prepared to defend the second section of the act of March 3, 1875, as a constitutional measure; he sought to avoid the effect of this admission by claiming that the presiding judge in his charge to the jury (p. 93) told them that the effect of the record evidence of the principal felon only made out a *prima facie* case; the attorney ignored the fact that appears (p. 21), that the presiding judge held that the record of conviction of the principal felons was conclusive. If the presiding judge had

changed his opinion as to the conclusiveness of the record prior to the making of the charge to the jury above alluded to, the record does not show it, and waiting until that time was "locking the stable after the horse was stolen."

Such reasoning is faulty for another cause, one accused of crime cannot be expected to have at his elbow during his trial evidence which the law says it will not receive; testimony has to be searched after and found and summoned before the trial begins, and it is monstrous to say that a judge could charge the harm out of this statute, by modifying and reversing the meaning of the words "conclusive," when that very word gave the plaintiff in error notice that it would be perfectly useless for him to introduce evidence in regard to an essential ingredient of his alleged crime.

But there is a graver and more important objection to this statute.

It is an unconstitutional and unwarrantable interference of the legislative with the judicial department of the government.

The legislature may properly prescribe the method of proof, such as, that seals of courts, corporations, commissions, etc., shall be judiciously noticed, but further than that they cannot go without encroaching upon the prerogative of the judiciary; they cannot say what shall be considered as proved, and this is so without regard to any constitutional question, but when a legislature attempts in criminal cases to enact that a certificate shall be "conclusive," it violates the prerogative of the judiciary, sets at naught the constitution and offends good sense.

It is matter of congratulation that notwithstanding the zeal of counsel, there is not to be found among the

distinguished corps of lawyers in the Attorney General's office, as now constituted, a single person who is willing "to do reverence" to this offensive statute, but it is a matter of "astonishment and concern" that any one can seriously advise this court that this offensive section should be permitted to remain upon the statute books in the vague and uncertain hope that in its administration, the *nisi prius* judges will rob it of its offensiveness, by saying that "*conclusive*" means *prima facie*.

> *But Titus said, with his uncommon sense,
> When th' exclusion bill was in suspense:
> "I hear a lion in the lobby roar;
> Say, Mr. Speaker, shall we shut the door
> And keep him there, or shall we let him in
> To try if we can turn him out again?"

The Standard definition of "conclude" (derived from *cum, claudo*—"to shut together") is "to bring to a completion; terminate; finish; as, to conclude an argument; to stop or restrain; in law, to estop; held bound by; usually in the passive; as, the plaintiff is concluded by his admission." The definition of "conclusive" is given as "decisive of the matter in issue; putting an end to doubt; sufficient to convince or decide; as, conclusive testimony."

While it is true that differing sections of the same law may not all be constitutional, and the unobjectionable sections stand while the objectionable ones are expunged, it cannot be that a section creating a crime theretofore unknown to the law, shall be considered unconstitutional and objectionable and constitutional and proper at the same time.

Outside of the domain of jugglery, bitter and sweet waters are not taken from the same source; and it

*Paraphrase by Bramston, of speech of Col. Titus, in the English Parliament, 1681.

would seem that if this court adheres to the doctrine, as announced by Mr. Justice Bradley and quoted in the original brief at page 21, this statute will disappear from our criminal jurisprudence, as section 860, R. S., and others, have disappeared, none of which, in my humble opinion, contained such a dangerous invasion of personal rights, as does the second section of the statute of March 3, 1875.

II.

But I consider, as being personally far more important to the plaintiff in error than any of the constitutional questions involved, the fact that I insist fully appears from the record that the plaintiff in error was not shown to have had any guilty knowledge whatever as to the property having been stolen from the United States.

No one testifies that the plaintiff in error himself received the stamps from the express man; the agent who delivered the package took a receipt bearing the name of the plaintiff in error and no one identified his signature, although inquiry was made, it goes without saying that if it had been the signature of the plaintiff in error, it would have been shown to be such; he was a practising lawyer and had resided in the city of Sioux Falls for several years, just how many the record does not disclose, but certainly long enough so that his signature could have been identified by witnesses, for several months intervened between the time when Fosness is shown to have had the receipt and the first trial, and there were nearly two months between the time of the trial in April, when the jury disagreed, and the trial in June, when he was convicted.

And in all confidence I assert that there is not in the testimony of Fosness and Van Buskirk (for none of the

other witnesses, except the express men at Sioux Falls, even knew the plaintiff in error) anything that would import guilty knowledge, nor was his conduct suggestive of such guilty knowledge, but was exactly that of an innocent person, and I am very glad to be able to make a sincere appeal to the court to set aside the verdict on this ground; the other grounds show the conviction to have been in violation of sacred personal rights; this ground shows it to have been unjust and a perversion of the right.

The plaintiff in error after having been once in jeopardy, appears to have been arraigned upon an indictment faulty and defective, based upon an unconstitutional statute before an improperly drawn jury, upon evidence perfectly consistent with his innocence, some of which was improperly admitted, deprived of other evidence improperly excluded, under a charge of the presiding judge, faulty as to what it contained and faulty in what it did not contain, convicted and sentenced upon a verdict which did not express the finding of the jury. Was there ever before such a tragedy of errors?

Respectfully submitted.

A. G. SAFFORD,

For Plaintiff in Error.